JUN 29 1970
E. ROBERT SEAVER, CLERK

SUPREME COURT OF THE UNITED STATES
October Term [redacted] 1970

No. 344

George G. Kilarjian, et. al:,

Petitioner,

-against-

United States of America, as owner of the USNS Blue Jacket,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCIS J. NICOSIA
Attorney for Petitioner
15 Park Row
New York, New York
(212) BA 7-2618

THE DICK BAILEY PRINTING SERVICE Telephone: (212) 447-5358

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1969

No.

GEORGE G. KILARJIAN, et. al.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 1, 1970.

Opinion Below

The opinion of the United States District Court for the Southern District of New York, dated October 3, 1969.

The opinion of the Court of Appeals for the Second Circuit is not as yet reported and is printed in full along with the opinion of the District Court as part of the appendix to this petition.

Jurisdiction of this court

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

1. Does the Foreign Claims Act, Title 10 U.S.C. Sec. 2734 (a) implementing the NATO-SOFA TREATY AGREEMENT provide an exclusive remedy for maritime collision claims against the United States, as held by the Court below, invalidating Title 10 U.S.C. Secs. 9801 - 9804, 9806 and precluding judicial relief in the District Court under the Public Vessel's Act; or, does it provide an ex gratia remedy available only for settlement of non-maritime foreign claims before suit is commenced?

2. Does the Foreign Claims Act, Title 10 U.S.C. Sec. 2734 (a) implementing the NATO-SOFA TREATY AGREEMENT preclude the right of Defendant-Appellant to counterclaim for collision damages in the District Court in Admiralty pursuant to provisions of Title 46 U.S.C. Sec. 783 of the Suits In Admiralty Act in a libel for collision damages filed by the United States—as clearly outlined in 32 C.F.R. Sec. 842.92, Rule 2, Note 2?

Reasons for Granting the Writ

The holding of the Court below, that the Foreign Claims Act Title 10 U.S.C. Sec. 2734 (a) provides an exclusive remedy for maritime wrongful death collision claims, precluding judicial relief in the District Court under the Public Vessel's Act, is in conflict with the decision of the United States Court of Claims in the case of *Bird & Sons, Inc. v. United States*, Jan. 23, 1970, reported in 420 F2d 1051, which holds that the Foreign Claims Act Title 10 U.S.C. Sec. 2734 provides only an ex gratia remedy which does not preclude judicial relief, as is indicated by the regulations implementing the Act. (32 C.F.R. Sec. 842.52(a), 842.68(a)2, 842.92 Rule 2, Note 2)

The holding of the Court below—that petitioner's right to counterclaim for collision damages in Admiralty against the United States was precluded by the Foreign Claims Act, Title 10 U.S.C. Sec. 2734 (a) implementing the NATO SOFA-AGREEMENT—conflicts with regulations implementing the Act (32 C.F.R. Sec. 842.68 (a) 2, 842.92 Rule 2, Note 2) and the decision of this Honorable Court in the case of *The Thekla*, 266 U.S. 328; 45 S.Ct. 112; 69 L.Ed. 313.

The Court below failed to consider the record of the minutes of the deliberations by the framers of the NATO-SOFA AGREEMENT, which unequivocally establishes that all maritime claims were excluded from the purview of the agreement; and, failed to consider the expressed "purpose" of the Foreign Claims Act—Title 10 U.S.C. Sec. 2734 (a)—not to effect any "substantive" change in existing law; and, thereby departed from the accepted and customary course of judicial proceedings in a manner requiring the supervision of this Honorable Court—insofar as the Court

below decides a vital novel question affecting maritime legislation respecting the intent of Congress undecided heretofor and which should be settled for the protection of all maritime claimants on an equitable basis in accord with the historic traditions of Admiralty Jurisprudence, and the Maritime Laws of all Nations.

Statement

The subject matter in suit treats with damages for wrongful death arising from a collision between the USNS Blue Jacket, a Public Vessel of the United States and a privately owned coastal freighter of German registry, M/V Dirk, on February 10, 1964, on the Weser river in German territorial waters.

On November 10, 1965, the Petitioner's predecessor Alfred M. Shafter instituted a suit indexed 65 Ad 1136 for wrongful death on behalf the dependents and next-of-kin of Georg Kostka, the deceased shipowner and master of the M/V Dirk, against the United States under the provisions of the Public Vessel's Act 46 U.S.C. Sec. 781, et. seq., which was dismissed on July 26, 1967 when Judge Marvin E. Frankel of the District Court for the Southern District of New York granted a government motion for summary judgment for want of subject-matter jurisdiction (273 F. Supp. 152). It was held that the treaty agreement must be read, "to exclude the concurrent and inconsistent jurisdiction" of the District Court under the Public Vessel's Act; (273 F. Supp. at page 156). This decision was affirmed by the Court of Appeals for the Second Circuit of New York—400. F2d. 584 (1968) and certiorari was denied.

On May 12, 1966 the government filed a separate libel indexed 66 AD 477 for collision damages to its vessel the

USNS Blue Jacket; asserting that jurisdiction of the District Court obtained over their property damage claim against the claimants herein represented by Alfred M. Shafter. Petitioners, having substituted for Alfred M. Shafter, moved for permission to amend their original answer and file a counterclaim for the wrongful death of Georg Kostka arising from the collision of the two aforesaid vessels.

The Court below on May 1, 1970, held that the petitioner's right to file a counterclaim for wrongful death herein against the government was precluded by Congressional assent to and implementation of the North Atlantic Treaty Status of Forces Agreement (NATO-SOFA)—in that the treaty created a comprehensive and exclusive scheme for adjudication and settlement, outside the jurisdiction of the United States District Courts, of a maritime claim against the United States for wrongful death, by a foreign administrative tribunal.

The petitioners respectfully seek to have this Honorable Court determine the force, and effect of the NATO-SOFA Agreement upon their right to assert a counterclaim in Admiralty against the United States for the wrongful death of Georg Kostka arising from the collision of the M/V Dirk with the USNS Blue Jacket, a public vessel of the United States; and, whether or not Title 10 U.S.C. Sec. 2734 (a), implementing the said treaty agreement provides an ex gratia remedy or an exclusive remedy under the circumstances of this case and in accord with the existing laws.

It is important to note that the holding of the Court below translates the treaty agreement to provide that the United States District Court does have jurisdiction over the subject-matter of the government's claim and all other property damage claims of shipowners, underwriters, and

cargo interests; but, that the Court's subject-matter jurisdiction of the wrongful death and personal injury claims has been withdrawn and substituted for by a foreign administrative tribunal.

The holding is diametrically opposed to the long established concepts of Admiralty Jurisprudence, the ancient fundamentals of the law of the sea, the basic principal of the historic development of the maritime law of all nations; and, the very precise expression of the Congress of the United States in the enactment of the Suits-in-Admiralty Acts known as the waiver statutes, and assumes greater proportions in this regard and of more vital importance herein insofar as the petitioners are left without any remedy whatsoever by reason of the fact that the claims of the petitioners have been rejected not only by the Courts below but by the foreign claims administrators as well and would hereafter be barred by limitation; if not by merger and bar upon the resolution of the government's libel herein against them.

Argument

1. The Foreign Claims Act Title 10 U.S.C. See. 2734, et. Seq. as amended (Supp. 1V 1969) provides an ex gratia remedy which does not preclude later judicial relief in the District Courts under the Public Vessel's Act; and, should be construed in the light of its purpose to promote and maintain friendly relations with inhabitants of foreign countries consistent with substantive rights provided by federal statutes and maritime laws to all maritime claimants alike.

2. When the United States sues in Admiralty an affirmative judgment may be rendered against it on a claim by petitioners growing out of the subject-matter (collision) of the government's suit, regardless of whether or not there has been a statutory waiver of sovereign immunity.

3. The judgment of the Circuit Court of Appeals for the Second Circuit affirming the lower Court failed to consider the purpose and intent of Congress and the legislative history of Title 10 U.S.C. Sec. 2734 et. seq. and/or the intent of the framers of the NATO-SOFA Agreement, which was distinctly designed to preserve the integrity, force and effect of all existing maritime legislation; and, did not contemplate any change in the substantive rights of maritime claimants, the laws governing them or the jurisdiction of the Courts thereof.

4. That a careful review of the legislation and the history thereof in this regard by this Honorable Court will establish the right of the petitioners herein to counterclaim against the government in the libel herein.

5. That the petitioners have been deprived of their substantive rights herein and thereby have been denied the equal protection of the laws as guaranteed under the Constitution.

POINT I

THE NATO-SOFA TREATY AGREEMENT AND IMPLEMENTING LEGISLATION TITLE 10 U.S.C. SEC. 2734(a) PROVIDE AN EX GRATIA REMEDY AND NOT AN EXCLUSIVE REMEDY.

The opinion of Judge Mansfield speaks of a strong Congressional policy and determination to place exclusive jurisdiction of maritime claims for wrongful death elsewhere than in the federal District Courts; but, on the contrary, the clear intent of Congress as expressed in the "Purpose" of title 10 U.S.C. Sec. 2734(a), was not to make any "substantive" changes in existing law. In the United States Code, Congressional and Administrative News—87th Congress, 2nd

Session, 1962, vol. 2. p. 2456, the purpose of the legislation is recited as follows:

> "This bill, as amended, is not intended to make any substantive change in existing law."

Surely, this would encompass the uniform maritime and admiralty laws and statutes of the United States, including the Suits-in-Admiralty Acts, and would concern also the exclusive subject-matter jurisdiction of the federal District Courts as defined and prescribed therein by the Congress.

All other references by the lower Court to Congressional policy and/or determination that the NATO-SOFA agreement and Title 10 U.S.C. Sec. 2734(a) was intended to provide an exclusive remedy over maritime claims is not supported factually or legally.

The judgment of the Circuit Court of Appeals holds as follows:

> "We believe that the wrongful death and personal injury counterclaim was covered by NATO-SOFA agreement, and thus not within the jurisdiction of the District Court. See *Shafter v. United States*, 273 F. Supp. 152, 153—56 (S.D.N.Y. 1967), aff'd. per curiam, 400 F2d. 584 (2d. Cir. 1968), cert. den. 393 U.S. 1086 (1969).

In *Shafter v. United States*, *supra*, Judge Marvin E. Frankel held that the treaty arrangements constituting the North Atlantic Treaty Status of Forces Agreement, "create a comprehensive and exclusive scheme for adjudication and settlement of claims within their purview," id. p. 153. He concluded that the Shafter claims for wrongful death and personal injuries must be considered withdrawn from the

Court's subject-matter jurisdiction.

These holdings are in conflict with the holding of Chief Justice Cowen in the case of *Bird & Sons, Inc. v. United States* - 420 F2d. 1051 (1970) to the effect that the Foreign Claims Act provides an ex gratia remedy which does not preclude later judicial relief. 10 U.S.C. Sec. 2734.*

Chief Judge Cowen states as follows:

p. 1057(5,6)

"Finally, the defendant contends that by "electing to pursue its remedies under the Foreign Claims Act, and not those provided for in the contract, plaintiff waived its right to seek relief based on the contract in this

* 10 U.S.C. Sec. 2734, as amended, (Supp. IV, 1969), in pertinent part, provides:

"**** To promote and maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned or any officer designated by him may, under such regulations as the Secretary may prescribe, appoint one or more claims commissions, each composed of one or more commissioned officers of the armed forces under his jurisdiction, to settle and pay any claim for not more than $15,000, for -

(1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or

(3) personal injury to, or death of, any inhabitant of a foreign country; if the damage, loss, personal injury, or death occurs outside the United States, or the Territories, Commonwealths, or possessions and is caused by, or is otherwise incident to non-combat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be."

court. The short answer to this contention is that the Foreign Claims Act provides an ex gratia remedy which does not preclude later judicial relief. This is indicated by the Air Force regulations implementing the Act, 32 C. F. R. Sec. 842.52(a) (1969)"**

Needless to say it would appear, therefore, that the holding of the Court below is in error insofar as the right of the petitioners, herein, to commence suit in the District Court under the Public Vessel's Act is concerned; for the wrongful death of claimant's decedent, arising from the collision of the USNS Blue Jacket and the M/V Dirk.

POINT II

WHEN THE UNITED STATES FILES A LIBEL IN ADMIRALTY FOR COLLISION DAMAGES TO ITS PUBLIC VESSEL THE RESPONDENT MAY COUNTER-CLAIM FOR WRONGFUL DEATH.

It has been held that the Sovereign, by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident to that act. *Luckenbach S. S. Co., Inc., et. al. v. The Thekla*, 266 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313.

** **** Since the Foreign Claims Act provides an ex gratia remedy, it should be broadly construed in the light of its purpose. In view of its expressed intent to promote and maintain friendly relations with inhabitants of foreign countries by expeditious settlement of meritorious claims, the United States must accept responsibility for almost all damage caused by members and employees of its armed forces. Some applicable acts and omissions are those which are criminal, negligent, willful, wrongful, and mere mistakes of judgment. Cause and merit are the primary criteria in determining applicability of the Act. Proof of fault is required only to the extent necessary to show that the claim is meritorious.

In that case, it was held that when the United States comes into court to assert a claim in Admiralty for collision involving two vessels, as herein concerned, the subject-matter in suite is not the vessel, but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. *Bowker v. United States*, 186 U.S. 135, 139; 22 S. Ct. 802, 804; 46 L. Ed. 1090.

The *Thekla, supra*, turns upon a relationship characteristic of claims in Admiralty arising from the collision of vessels which is entirely absent in other types of claims.

In *United States v. Shaw*, 309 U.S. 495; 60 S. Ct. 659; 84 L. Ed. 888, the Court held—60 S. Ct. at page 662 as follows:

> "The subject-matter of a suit for damages in collision is not the vessel libled, but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided. As a consequence, when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision."

The Thekla ruling was motivated by obvious considerations of public policy enacted into law in the Suits-in-Admiralty Acts of 1920, 46 U.S.C., Sec. 742.

In The Thekla case the United States was the owner, pro. hoc. vice., of the SS F. J. Luckenback, one of the vessels involved in the collision, which was the object of the case. Hence, as a shipowner operating ships which were constantly

exposed to collision, the United States could not claim sovereign immunity as a defense.

As early as 1797, the United States Congress recognized the injustice of the doctrine and modified it to the extent that when the United States brought a civil action against an individual, the individual defendant was allowed to set off debts due him from the government.

In 1857 Congress boldly took the first step toward making the government responsible for its debts by creating the Court of Claims. In 1877 Congress went further and gave concurrent jurisdiction to the United States Courts to entertain claims against the government sounding in contracts. Then by a series of acts, notably the Federal Employees' Compensation Act of 1916 (39 Stat. 742, 5 U.S.C. Sec. 751 et. seq.) the United States made itself liable to pay workmen's compensation to its employees.

Acknowledgment of governmental responsibility was further expanded by the passage in 1920 of the Suits-in-Admiralty Act, (41 Stat. 525, 46 U.S.C. 741 et. seq.) followed in 1925 by a similar act applying even to actual ships of war. And then finally Congress almost wholly dismantled the wall surrounding sovereign immunity by passage of the Federal Tort Claims Act of 1946, 60 Stat. 843, 28 U.S.C. Sec. 1346 (b).

After thus opening the gates of justice to American claimants, our government decided to make itself liable to foreign claimants as well because one should not be less just outside his house than he is under his own roof—in keeping with the American System of Jurisprudence which symbolizes equality for all.

The United States embarked on the policy of not claiming immunity for its publicly owned or publicly operated merchant vessels.

The decision of the court below is in direct conflict with this firm congressional policy insofar as it is based on the erroneous holding of Judge Marvin E. Frankel, in *Shafter v. U.S.A.*, 273 F. Supp. at page 156, that:

> "* * * * It seems equally clear that the specific and detailed remedial apparatus under the later treaty should be deemed to substitute, pro-tanto for the general consent to suits under the Statute."

The conflict is further dramatized by the simple fact that Congress has expressly provided that the "Purpose" of Sec. 2734(a) of Title 10 of the Foreign Claims Act is not to effect any "substantive" change in existing law; and, afortiori there is absolutely no verbal expression by Congress to support the holding of the Court below; which, rather than follow the will of Congress does violence to the fundamental concept and purpose of the Suits-in-Admiralty Acts, et. seq.; and, the very basic and profound purpose couched in the waiver of sovereign immunity contained and provided therein—both as to original suits against the government as well as to counterclaims.

POINT III

A BRIEF CONSIDERATION OF THE PURPOSE OF THE FOREIGN CLAIMS ACT AND THE RECORD OF THE DELIBERATIONS OF THE FRAMERS OF THE NATO-SOFA AGREEMENT AND THE REGULATIONS IMPLEMENTING THE ACT (32 C.F.R. Sec. 842.92, Rule 2, Note 2) CLEARLY SHOWS THE ERROR OF THE COURT BELOW.

1. The legislative history of the Foreign Claims Act,

said by Judge Marvin E. Frankel in his decision in the *Shafter case, supra*, to have implemented the NATO-SOFA TREATY, Title 10 U.S.C., Sec. 2734(a), (United States Code, Congressional and Administrative News, 87th Congress 2nd Session, 1962, Volume 2, p. 2456), recites for the purpose thereof as follows:

> "This bill, as amended, is not intended to make any substantive change in existing law."

Thus, if the legislation which was said by the Court below to have implemented the NATO-SOFA TREATY Agreement, was not intended to make any substantive changes in existing laws, it follows that there could not have been any contemplation, purpose or intent on the part of Congress to alter, withdraw, or substitute for, the jurisdiction of the District Court over the subject-matter of the wrongful death claims in Admiralty in this case against the government insofar as concerns the waiver of sovereign immunity under the Public Vessel's Act.

2. As to the record of the deliberations of the Framers of the NATO-SOFA AGREEMENT, neither Judge Walter R. Mansfield in the decision by the District Court below, herein; nor Judge Marvin E. Frankel in the *SHAFTER case, supra*, upon which the District Court and the Circuit Court based their erroneous opinions; had available to them or bothered to consider the minutes thereof respecting the intent and purpose relative to maritime claimants and legislation thereon.

In Volume LIV of International Law Studies, of Georgetown University Law Center, (1961) printed by the United States Government Printing Office, at page 466, par. 17(g), appears a proposed draft of a provision to include Third-Party maritime claims within the purview of the

NATO-SOFA TREATY AGREEMENT (Article VIII par. 5(h)); and, on pages 153-4, par's. 7 thru 13 incl., appears the complete and unequivocal rejection of the said proposal by the government—which, by the lower courts ruling is cast aside contrary to the intent and purpose thereof—in the nature of judicial fiat or legislation, as it were.

Thus, we find that there is no support for the lower Court's opinion, nor for the opinion of the Circuit Court of Appeals based thereon—which followed its lead without question or inquiry, as would be normal procedure under the circumstances, where far reaching and novel changes or interpretations of intent are ascribed to an unwitting Congress at the expense of the claimants herein without reason or logic on an entirely inequitable basis.

3. The regulations implementing the Foreign Claims Act, Title 32 C. F. R. Sec. 842.68 (a)(2) under the heading of "Counterclaims (NATO)"; recites as follows:

> "(2) Paragraph 5(h) Article VIII, also excludes from this provision claims arising out of or in connection with the navigation or operation of a ship or with the loading, carriage, or discharge of a cargo (See Subpart H of this part)."

It would seem clear from the foregoing that wrongful death claims arising from the operation of the USNS Blue Jacket, a Public Vessel of the United States, involved here in collision with the privately owned coastal freighter M/V Dirk would not be covered by the NATO-SOFA AGREEMENT; and afortiori; could be maintained against the United States under the Public Vessel's Act.

Under "Subpart H"—Admiralty Claims (10 U.S.C.

9801-9804 and 9806), as aforementioned, Section 842.92, Rule 2, Note 2, specifically provides that personal injury and death claims may be subject to suit under the Public Vessels Act; including the death claims of longshoremen who may be involved in the discharge of Public Vessels in Nato countries.

The holding of the Court below—which interprets the provisions of the NATO-SOFA agreement contrary to the interests of the claimants herein and in support of the interests of the government as well as the other claimants for property damages arising from the collision of the two vessels is arbitrary, irresponsible, capricious and indefensible as applied to the claims of the petitioners herein for wrongful death in Admiralty.

Such preferential treatment, respecting the subject-matter jurisdiction over claims in Admiralty of the District Court, does not apply to the United States Government or to the other property damage claimants and is an unwarranted and unconstitutional denial of equal protection of the laws to the petitioners herein.

There is no basis for this unequal and discriminatory treatment of wrongful death and personal injury claimants engaged in the maritime industry in international commerce and there is no legal or rational justification for such discriminatory treatment—particularly in a Court of Admiralty.

Conclusion

The decision of the Court below promotes the idea of a promiscuous, general allowance of absolute sovereign immunity which could undermine the whole structure of international trade which depends on prompt liquidation of monetary obligations.

The Sovereign immunity doctrine is no longer a healthy manifestation of society. It is, in fact, an excrescence on the body of the law, in that it encourages irresponsibility to world order, it generates resentments and reprisals. Sovereign immunity is a stumbling block in the path of good neighborly relations between nations, it is a sour note in the symphony of international concord, it is a skeleton in the parliament of progress, it encourages government toward chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud and not in the nature of the principles of Admiralty Jurisprudence that formulates the historic law of the sea among the maritime nations of the world.

The decision of the Court below is not in accord with the law and untenably discriminates against personal injury and wrongful death claimants; unjustly depriving the petitioners of their substantive rights and equal protection of the laws under the Constitution; and, should be reversed and the petitioners be given an opportunity to be heard.

Respectfully submitted,

Francis J. Nicosia
Attorney for.
Defendant-Appellant

George G. Kilarjian,
Of Counsel.

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Appendix A — Judgment and Order of Affirmance of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and seventy.

Present:

HON. IRVING R. KAUFMAN,

HON. WILFRED FEINBERG,

, Circuit Judges,

HON. WILLIAM H. TIMBERS,

District Judge.

Circuit Judges.

United States of America, as owner
of the USNB Blue Jacket,
Plaintiff-Appellee,
v.
Alfred M. Shafter, as next friend of the
deponents and next of kin of George Joseph
Kostka, Dr. Horst Willner, as Administrator

of the Estate of Georg Kostka, deceased,
the owner of the German motorship Dirk,
Albingia Versicherungs-Aktiengesellschaft,
and The British Marine Mutual Insurance
Association, Ltd.,
Defendants,
George G. Kilarjian,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO Clerk

A true copy,
s/ A. Daniel Fusaro
Clerk

[U.S. District Court Filed Apr 30, 1970 S.D. of N.Y. Docketed As A Judgment Number 70,676 On May 1, 1970]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 660—September Term, 1969.
(Argued March 31, 1970—Decided April 1, 1970.)
Docket No. 34340

UNITED STATES OF AMERICA, as Owner of the USNS Blue Jacket,
Appellee,

v.

Alfred M. Shafter, as next friend of the dependents and next of kin of Georg Joseph Kostka, Dr. Horst Willner, as administrator of the Estate of Georg Kostka, deceased, the owner of the German motorship Dirk, Albingia Versicherungs-Aktiengesellschaft, and The British Marine Mutual Insurance Association Ltd., Appellants.

Before:

KAUFMAN AND FEINBERG, Circuit Judges, and TIMBERS, District Judge.*

Appeal from judgment of the United States District Court, Southern District of New York, Walter R. Mansfield, Judge, denying leave to file counterclaims for personal injuries, wrongful death, and lost business, and denying motion for substitution of attorneys and representatives.

Affirmed.

Appendix B - Opinion of the Court of Appeals affirming order of District Court.

Francis J. Nicosia, New York, N.Y., for appellants.

Bruno Ristau, Washington, D.C. (William D. Ruckelshaus, Assistant Attorney General, Whitney North Seymour, Jr., United States Attorney, New York, N. Y., Morton Hollander, Philip A. Berns, Attorneys, Department of Justice, Washington, D. C., on the brief), for appellee.

Per Curiam:

Although we affirmed this case in open court we believe it advisable briefly to set forth our reasons.

We have jurisdiction to hear this appeal on two alternate grounds: (1) on the assumption that the application before the lower court may be treated as one for intervention as of right, and (2) that the proper evidence of substitution of attorneys and representatives, though not before Judge Mansfield at the time of his opinion, has been subsequently filed.

Upon the merits, we affirm on Judge Mansfield's thorough opinion, reported at —F.R.D.— (1969). We believe that the wrongful death and personal injury counterclaim was covered by the NATO-SOFA agreement, and thus not within the jurisdiction of the District Court.[1] See *Shafter v. United*

States, 273 F.Supp. 152, 153-56 (S.D.N.Y. 1967), aff'd *pe curiam*, 400 F.2d 584 (2d Cir. 1968), cert. denied, 393 U.S 1086 (1969).

[1] Appellant seems to have abandoned his counterclaim for lost business; in any case he does not urge that we review that portion of the judgment on appeal.

Appendix C - Opinion No. 36199 by J. Mansfield for the United States District Court for the Southern District of New York

Bernard Shafter
Proctor for Alfred Shafter, as next friend of the dependents and next of kin of Georg Joseph Kostka

Jacob Rassner, Esq., New York City, Of Counsel.

Albingia Versicherungs-Aktiengeselischaft and British Marine Mutual Insurance Assn.
80 Broad Street
New York, N.Y. 10004
Charles S. Haight, Jr., Esq.,
Of Counsel

Francis J. Nicosia, Esq.
Attorney for George G. Kilarjian
15 Park Row
New York, N. Y. 10038

MANSFIELD, D. J.

In this libel filed in May 1966 of the United States Government seeking recovery of damages suffered by its vessel as the result of a collision with a ship in which defendants had varying interests, one Francis J. Nicosia, who represents himself to be the substituted attorney for a defendant sued in a representative capacity (Alfred M. Shafter, as next friend of the dependents and next of kin of Georg Kostka) has moved pursuant to Rule 15(a) for amendment of defendant's answer

to substitute another person as the representative and, pursuant to Rules 13(a) and (f), F. R. C. P., for leave to file a counterclaim on behalf of such defendant. For the reasons stated below the motion is denied. The background facts are as follows:

On February 10, 1964, a vessel owned by the United States, the USNS Blue Jacket, collided with a German fishing boat, the M/V Dirk, which sank on the Weser river in the territorial waters of the Federal Republic of Germany. Six members of the Dirk's seven-man crew, including her captain and owner, George Kostka, were killed; the seventh survived, but suffered physical injuries.

On the 8th of May, 1964, in accordance with applicable provisions of the North Atlantic Treaty Status of Forces Agreement,[1] various representatives of the captain and crew of the Dirk, together with the compensation underwriters who had made payments to them, filed claims with the German Defense Costs Office for the deaths, personal injuries, and property damage suffered by the Dirk and its crew. On November 2, 1965, all such claims were denied. The Defense Costs Office in Bremen ruled that the property damage claims fell outside its jurisdiction, since Article VIII(5) (h) of the Status of Forces Agreement limited compensation under the treaty to claims for death or personal injury.[2] The death and personal injury claims were denied on the merits, the Defense Costs Office being of the opinion that on all the available evidence the collision had been solely caused by improper navigation of the Dirk.

The compensation underwriters promptly appealed pursuant to Article 12(1) of the Implementation Law providing for appeal to the German courts from determinations by the Defense Costs Office. No appeal was

taken by the individual representatives, who then resorted to remedies against the United States under the Public Vessels Act (46 U. S. C. §§781, *et seq.*) in the United States Courts.

Three separate suits followed. The first libel ("Shafter libel") was filed in this Court on November 10, 1965 (65 AD 1136), by Alfred M. Shafter, as next friend of the dependents and next of kin of Georg Kostka (the owner and master of the Dirk) and the members of his crew. In addition to stating causes of action for wrongful death and personal injuries, Shafter sued to recover for property damage arising out of the loss of the Dirk.

The second libel ("Kostka Estate's libel") was filed, also in this Court, on February 9, 1966 (66 Ad. 132), by Kostka's estate and two hull underwriters of the Dirk, Albingia Versicherungs-Aktiengesellschaft and the British Marine Mutual Insurance Association, Ltd., seeking recovery for property damage and loss arising out of the sinking of the Dirk. Discussions between counsel for Shafter and the Administrator of Kostka's estate as to their competing claims for the same property damages and loss led to the filing of a notice in 65 Ad. 1136, the original Shafter libel, "having the force and effect of an amended libel," whereby libelants in that action agreed to move at trial to strike "all claims predicated on property loss or damage."

The third libel (66 Ad. 477) ("Government libel"), out of which the instant motion arises, was filed by the United States on May 12, 1966, simultaneously with the filing of its answer in the Shafter trial. The Government sought recovery for damage suffered by the USNS Blue Jacket in its collision with the Dirk, and named as defendants Shafter, as next friend of the dependents and next of kin of Georg Kostka; Dr. Horst Willner, as administrator of the Kostka estate; and

the aforementioned two hull underwriters of the Dirk. The Kostka estate was joined as a respondent because of Kostka's ownership of the Dirk, and the Kostka heirs because of their liability under § 1967 of the German Civil Code for the liabilities of the estate.

On July 26, 1967, Judge Frankel granted the Government's motion for summary judgment dismissing the Shafter libel for want of jurisdiction of the subject matter. 273 F. Supp. 152 (S.D.N.Y. 1967).[3] The treaty arrangements constituting the North Atlantic Treaty Status of Forces Agreement, he held, "create a comprehensive and exclusive scheme for adjudication and settlement of claims within their purview," *id.* p. 153. Finding that the Blue Jacket had been part of a "force" governed by the provisions of the Agreement, he concluded that the Shafter claims for wrongful death and personal injuries, which were covered by paragraph 5(h) of Article VIII of the Agreement, must be considered withdrawn from the court's subject-matter jurisdiction. The Court of Appeals affirmed per curiam, 400 F. 2d 584 (2d Cir. 1968), and certiorari was denied.

Because Shafter's own action against the Government was pending at the time when he was named a defendant in the Government's libel for damages to the Blue Jacket (66 Ad. 477), he did not bother to reassert his claims for wrongful death and personal injuries as counterclaims in the latter suit. Now that his libel against the Government has been dismissed by Judge Frankel, however, he has apparently changed his mind. Francis Nicosia, purporting to act as substituted proctor for the Kostka heirs, moves pursuant to Rules 13(a), 13(f) and 15(a), F. R. C. P. for permission to substitute George G. Kilarjian for respondent Alfred M. Shafter, and to file a counterclaim against the Government seeking damages in the amount of $10,000 for Kostka's

wrongful death and $500,000 for loss of business as a result of the sinking of the Dirk.

The United States objects to the wrongful death counterclaim on jurisdictional grounds, arguing, *inter alia*, that Judge Frankel's opinion constitutes *res judicata* as to the court's jurisdiction over the subject matter of the claim. The Administrator of Kostka's estate and the two insurers object to the lost profits counterclaim on the grounds that it poaches upon their property damage territory in contravention of their earlier agreement with Shafter's attorney, Jacob Rassner. The Government also resists substitution of Nicosia for Rassner and of Kilarjian for Shafter, arguing that no substitution of attorneys has been filed with the Court and the papers fail to reveal any authorization from the defendants and next of kin for substitution of Kilarjian.

The Proposed Counterclaim for Wrongful Death and Personal Injuries

Movant rests his application upon the proposition that where a court has jurisdiction over the main claim, as this Court indisputably has over the Government's claim for property damage to the USNS Blue Jacket, it also has ancillary jurisdiction over compulsory counterclaims even though independent jurisdictional grounds may be absent and the Government has not expressly waived immunity.

Up to a certain point movant's hypothesis is sound enough. Although a permissive counterclaim under Rule 13(b), F.R.C.P., needs independent jurisdictional grounds to support it, a compulsory counterclaim—one arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim," Rule 13(a), F.R.C.P.—does not. It is

regarded as ancillary or auxiliary to the main claim, and jurisdiction over that claim affords sufficient basis to adjudicate the counterclaim. 3 J. Moore, *Federal Practice* paragraph 13.15 (2d ed. 1968); *Moore v. New York Cotton Exchange*, 270 U. S. 593, 608-609 (1926). Here movant's proposed wrongful death and personal injury counterclaim, arising out of the same collision in which the Blue Jacket was damaged, would normally satisfy the requirements of a compulsory counterclaim. Rule 13(a) further provides that a claim meeting these requirements need not be stated if, at the time the main action was commenced, the claim was the subject of another pending action. Movant's failure to plead his counterclaim for wrongful death and personal injuries at the time the Government's libel was filed in 1966, therefore, does not prejudice his present attempt to do so.

Since the doctrine of auxiliary jurisdiction thus teaches that no independent jurisdictional ground is required for assertion of a compulsory counterclaim, a finding of lack of jurisdiction over such claims in a prior judicial proceeding would not ordinarily bar assertion of those claims as compulsory counterclaims in a later suit, any more than an earlier dismissal for want of jurisdictional amount would bar assertion of a $5,000 counterclaim for property damage in a subsequent action. Furthermore, when the United States sues in admiralty, an affirmative judgment may be rendered against it on a claim by respondent growing out of the subject matter of the Government's suit, regardless whether or not there has been a statutory waiver of sovereign immunity.[4] 3 J. Moore, *Federal Practice* paragraph 13.27, at 72-73 (2d ed. 1968); *United States v. National City Bank of New York*, 83 F. 2d 236, 238 (2d Cir.), *cert. denied*, 299 U.S. 563 (1936); *United States v. The Thekla*, 266 U.S. 328 (1924).

Although the proposed counterclaim might ordinarily be

asserted in such a suit, the right to do so here has been precluded by Congressional Assent to and implementation of the North Atlantic Treaty Status of Forces Agreement, since, as Judge Frankel found, the treaty created a comprehensive and exclusive scheme for adjudication and settlement outside of the federal courts of the claim which movants now propose to assert in the form of a counterclaim. The detailed treaty arrangements, as well as the implementing legislation passed in connection with the treaty, must be read "to exclude the concurrent and inconsistent jurisdiction" invoked by Shafter under the Public Vessels Act. 273 F. Supp. at 156. In giving its assent to the Status of Forces Agreement, the Senate took into consideration "that disposition of third-party claims by the Government of the place where the asserted wrong occurred (normally the country of the claimant's citizenship or residence, as in the case of the claimants here) would promote fairness, ease friction, and, incidentally, be likely to result in awards against the United States more modest than those commonly recovered in American courts." 273 F. Supp. at 156. All these functions of the treaty would be diluted if claimants were allowed to bypass the claims procedures specified in the Status of Forces Agreement by asserting such claims for adjudication in the district courts. Although permission to assert such claims by way of counterclaim would not open up the possibility of forum-shopping inherent in the right to initiate independent suits directly, the strong Congressional policies embodied in the Status of Forces treaty would be undercut in both cases.

None of the policies underlying the compulsory counterclaim rule are sufficiently compelling to override the Congressional determination to place exclusive jurisdiction of such claims elsewhere than in the federal courts. The genesis of the admiralty rule as to counterclaims was the manifest injustice of allowing a sovereign to press claims against a defendant who might well be entirely barred by the doctrine of sovereign immunity from bringing his own action in return. Here, however, we have an elaborate procedure specifically

designed to expedite claims against the United States for damage caused by its vessels. Movant cannot argue that he has been denied a full and fair opportunity to assert his claim against the United States. It may be true that at this point in the case, nearly three years after movant's decision to forego appeal through the German courts, no alternatives to this counterclaim remain open to him. But jurisdiction cannot be created in this Court by such a legal tactical decision.

The motion for leave to file a counterclaim for wrongful death and personal injuries must therefore be denied.

The Counterclaim for Lost Business

Movant also seeks to assert a counterclaim in the amount of $500,000 for lost profits on behalf of the heirs and next of kin of Georg Kostka as owner and master of the Dirk. No jurisdictional objection is or can be raised as to this portion of the motion: the Public Vessels Act, 46 U.S.C. § 783, specifically authorizes counterclaims for "damages arising out of the same subject matter or cause of action" as the Government's claim, and the Status of Forces Agreement, while it provides for adjudication of claims for death or personal injuries, does not apply to claims for property damage.

Upon the Government's commencement of the present suit, however, movant's claim for property damage was not the subject of another pending action. On March 16, 1966, Jacob Rassner, counsel for defendants and next of kin of the captain and crew of the Dirk, filed a notice in the original Shafter suit withdrawing "all claims predicated on property loss or damage, including any claim for loss of the vessel or cargo or personal effects." The notice further specified that "all claims for such relief are specifically reserved for and on

behalf of the respective libelants, which claims are to be asserted and prosecuted on their behalf by the firm of Haight, Gardner, Poor & Havens, Esqs."

Since movant's proposed counterclaim did not come within the exception provided in Rule 13(a) for claims which were the subject of another pending action, he was not barred from asserting it in Shafter's answer filed on June 10, 1966. He may now assert, therefore, only pursuant to Rule 13(f), which provides that when a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment. No basis has been shown here for exercise of our power pursuant to Rule 13(f), which is discretionary. *Ferber Co. v. Ondrick*, 310 F. 2d 462 (1st Cir. 1962); *New Britain Machine Co. v. Yeo*, 358 F. 2d 397 (6th Cir. 1966). The record before us discloses no oversight, excusable neglect or any other reason justifying late filing. On the contrary, it reveals that defendant's counsel deliberately relinquished the claim to the Kostka estate's counsel, who then asserted it in the estate's separate libel. Movant's argument that Shafter only relinquished to the Kostka estate the claim for replacement cost, not the claim for lost profits, is sharply disputed by counsel for the estate who contends that the Administrator of the Kostka estate is the only party entitled to assert a claim for property damage of any kind and that there is no material distinction between the cost of replacement of the Dirk and loss of business because of its sinking. We find it unnecessary to resolve this finespun question for the reason that after considering all aspects, including the confusion that would result from further fragmentation of the claims, the motion must, in the exercise of our discretion, be denied.

Proposed Substitution of Attorneys and Representative of Dependents of Kostka

In his original suit Shafter acted as next friend for the dependents and next of kin of both Kostka and the other six crew members. Bernard Shafter served as proctor for Alfred Shafter, and Jacob Rassner was counsel for Bernard Shafter.

Movant now proposes that the Kostka dependents and next of kin split off from the dependents and next of kin of the other crew members, and proceed with Francis Nicosia as their new counsel and one George Kilarjian as the replacement for Alfred Shafter as next friend of the Kostka dependents. Apparently the two Shafters and Jacob Rassner would continue to represent the dependents and next of kin of the other crew members.

We cannot grant a motion for realignment of the parties' representatives without more complete documentation. Proper evidence of the consent of both principals to the Alfred Shafter-George Kilarjian substitution, and consent of all three principals to the substitution of Francis Nicosia for Bernard Shafter and Jacob Rassner, and of the real parties in interest represented by these respective attorneys, would first be required. We have before us only Kilarjian's affidavit asserting that he has "substituted Alfred M. Shafter as next friend of the dependents and next of kin of George Joseph Kostka," and that "My representation of the widow is fitting and proper in substitution for Alfred M. Shafter, and at the appropriate time proof of this representation will be submitted." No such proof has yet been offered. Nicosia's affidavit asserts that he has "substituted for Bernard Shafter, as proctor, and Jacob Rassner, as counsel herein." But we have nothing signed by Alfred Shafter, Bernard Shafter or any of the real parties in interest indicating their consent to such

changes.

For the foregoing reasons the motions for substitution of representatives and counsel are denied without prejudice to renewal upon proper papers.

It is so ordered.

s/Walter R. Mansfield
U.S.D.J.

Dated: October 3, 1969.

FOOTNOTES

1. Agreement of June 19, 1951, 4 U.S.T. 1792, to which the Federal Republic of Germany acceded by a Supplementary Agreement of August 3, 1959, effective July 1, 1963, 14 U.S.T. 531.

2. Paragraph 5(h) of Article VIII of the Agreement states that

> "[With immaterial exceptions] the provisions of this paragraph shall not apply to any claim arising out of or in connection with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply."

Paragraph 4 is a waiver of claims by the contracting governments against each other for injuries or deaths suffered by members of their armed forces in the course of official duties.

3. This apparently was a mispleaded Rule 12(b) (1), F.R.C.P., motion to dismiss. See 6 J. Moore, *Federal Practice* paragraphs 56.17 [36], 56.03 at 2052 (2d ed. 1966).

4. In this case there has in fact been a statutory waiver of sovereign immunity: the Public Vessels Act provides that

> "In the event of the United States filing a libel ... in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may ... counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action." (46 U.S.C. § 783.)

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 344

GEORGE G. KILARJIAN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF PETITIONER IN REPLY

Francis J. Nicosia
Attorney for Petitioner
15 Park Row
New York, New York
(212) BA 7-2618

DICK BAILEY PRINTING SERVICE Telephone: (212) 447-5358